DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 424

[Docket No. FWS-HQ-ES-2021-0107, FF09E23000 FXES1111090FEDR 234; Docket No. 230607-0142]

RIN 1018–BF95; 0648–BK47

Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat

AGENCY: U.S. Fish and Wildlife Service, Interior; National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Proposed rule; request for comment.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS; collectively, the "Services"), propose to revise portions of our regulations that implement section 4 of the Endangered Species Act of 1973, as amended (Act). The proposed revisions to the regulations clarify, interpret, and implement portions of the Act concerning the procedures and criteria used for listing, reclassifying, and delisting species on the Lists of Endangered and Threatened Wildlife and Plants and

designating critical habitat.

DATES: We will accept comments from all interested parties until [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** below), the deadline for submitting an electronic comment is 11:59 p.m. eastern time on that date.

ADDRESSES: You may submit comments and information on this document by one of the following methods:

(1) *Electronically*: Go to the Federal eRulemaking Portal: *https://www.regulations.gov*. In the Search box, enter FWS-HQ-ES-2021-0107, which is the docket number for this rulemaking action. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on "Comment." Please ensure that you have found the correct rulemaking before submitting your comment.

(2) *By hard copy*: Submit by U.S. mail to: Public Comments Processing, Attn: FWS-HQ-ES-2021-0107; U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

See **Request for Comments**, below, for further information.

FOR FURTHER INFORMATION CONTACT: Carey Galst, U.S. Fish and Wildlife Service, Division of Ecological Services, Branch of Listing Policy and Support Chief, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703–358–1954; or Angela Somma, National Marine Fisheries Service, Office of Protected Resources, Endangered Species Division Chief, 1315 East-West Highway, Silver Spring, MD 20910, telephone

301–427–8403. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

The Secretaries of the Interior and Commerce (the "Secretaries") share responsibilities for implementing most of the provisions of the Endangered Species Act, as amended (hereafter referred to as "ESA or the Act;" 16 U.S.C. 1531 et seq.), and authority to administer the Act has been delegated by the respective Secretaries to the Director of FWS and the Assistant Administrator for NMFS. Together, the Services have promulgated regulations that interpret aspects of the listing and critical habitat designation provisions of section 4 of the Act. These joint regulations, which are codified in the Code of Federal Regulations at 50 CFR part 424, were most recently revised in 2019 (84 FR 45020, August 27, 2019; hereafter, "the 2019 rule"). Those revised regulations became effective September 26, 2019.

Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis," issued January 20, 2021, directed all departments and agencies to immediately review agency actions taken between January 20, 2017, and January 20, 2021, and, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding agency actions that conflict with important national objectives, including promoting and protecting our public health and the environment, and to immediately commence work to confront the climate crisis. A "Fact Sheet" that accompanied E.O. 13990 provided a non-exhaustive list of particular

regulations requiring such a review and included the 2019 rule (see *www.whitehouse.gov/briefing-room/statements releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/*). In response to E.O. 13990 and in light of recent litigation over the 2019 rule, the Services have reviewed the 2019 rule, evaluated the specific regulatory revisions promulgated through that process, and now propose to make revisions to the regulations at 50 CFR part 424 as discussed in detail below.

The 2019 rule, along with other revisions to the ESA regulations finalized in 2019, were subject to litigation in the United States District Court for the Northern District of California. On July 5, 2022, the court issued a decision vacating the 2019 rule, without reaching the merits of the case. On September 21, 2022, the United States Court of Appeals for the Ninth Circuit temporarily stayed the effect of the July 5th decision pending the District Court's resolution of motions seeking to alter or amend that decision. On October 14, 2022, the Services notified the District Court that we anticipated proceeding with a rulemaking process to revise the 2019 rule. Subsequently, on November 14 and 16, 2022, the District Court issued orders remanding the 2019 regulations to the Services without vacating them, as the Services had asked the Court to do. Accordingly, the Services have developed the following proposal to amend some aspects of the 2019 rule.

This proposed rule is one of three proposed rules publishing in today's *Federal Register* that propose changes to the regulations that implement the ESA. Two of these proposed rules, including this one, are joint between the Services, and one proposed rule is specific to FWS.

Section 2 of the Act states that the purposes of the Act include providing a means to conserve the ecosystems upon which endangered and threatened species depend, developing a program for the conservation of listed species, and achieving the purposes of certain treaties and conventions (16 U.S.C. 1531(b)). Section 2 of the Act also makes

explicit that it is the policy of Congress that all Federal agencies and departments seek to conserve threatened and endangered species and use their authorities to further the purposes of the Act (16 U.S.C. 1531(c)).

To determine whether listing a species is warranted, the Act requires that the Services conduct a review of the status of the species and consider any efforts being made by any State or foreign nation (or subdivision thereof) to protect the species. The Act also requires that determinations of whether a species meets the definition of an endangered or threatened species be based solely on the best scientific and commercial data available (16 U.S.C. 1533(b)(1)(A)).

When a species warrants listing, the Act requires the Services to designate critical habitat concurrent with the listing rule to the maximum extent prudent and determinable, or within 1 year following listing if critical habitat was not initially determinable. Critical habitat is defined in section 3 of the Act as: (1) the specific areas within the geographical area occupied by the species at the time it is listed on which are found those physical and biological features that are essential to the conservation of the species and that may require special management considerations or protections; and (2) specific areas outside the geographic area occupied by the species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species (16 U.S.C. 1532(5)). The Act sets forth a two-part definition for critical habitat based on whether the species occupies an area or does not occupy an area at the time of listing. For simplicity, throughout this document we will refer to the former type as "occupied" critical habitat and the latter type as "unoccupied" critical habitat.

In passing the Act, Congress viewed habitat loss as a significant factor contributing to species endangerment, and the "present or threatened destruction, modification, or curtailment" of a species' habitat or range is specifically listed in section 4(a)(1) of the Act as the first of the factors that may underlie a determination that a

species meets the definition of an endangered or threatened species. The designation of critical habitat is a regulatory tool designed to further the conservation of a listed species, i.e., to help bring the threatened or endangered species to the point at which protection under the Act is no longer necessary. More broadly, designation of critical habitat also implicitly serves as a tool for meeting one of the Act's stated purposes: Providing a means for conserving the ecosystems upon which endangered and threatened species depend. Once critical habitat is designated, Federal agencies must ensure that any actions they authorize, fund, or carry out are not likely to result in destruction or adverse modification of the critical habitat (16 U.S.C. 1536(a)(2)).

Proposed Changes to Part 424

Following a review of the specific regulatory revisions made in the 2019 rule, the Services propose to revise several of those same regulatory provisions of 50 CFR part 424, as detailed below. The specific changes to the regulations proposed herein are intended to be prospective standards only. If finalized, these regulations would apply to classification and critical habitat rules finalized after the effective date of this rule and would not apply retroactively to classification and critical habitat rules finalized prior to the effective date of this rule. Nothing in these proposed revisions to the regulations is intended to require (at such time as this rule becomes final) that any prior final listing, delisting, or reclassification determinations or previously completed critical habitat designations be reevaluated on the basis of any final regulations.

Section 424.11—Factors for Listing, Delisting, or Reclassifying Species

Economic Impacts

We are proposing to restore the phrase "without reference to possible economic or other impacts of such determination" to the end of 50 CFR 424.11(b) to clarify and affirm

that, consistent with the plain language of the statute, the economic impacts and any other impacts that might flow from a listing decision must not be taken into account when making listing, reclassification, and delisting (collectively, classification) determinations. In 2019, when we removed this phrase, we reasoned that it was not necessary because neither the Act nor the legislative history indicates that Congress intended to completely prohibit the Services from compiling economic information about potential listings, and because there may be circumstances in which referencing economic or other impacts would be informative to the public. Based on our subsequent review of the 2019 rule, the language of the Act, and the legislative history, we find that this change was not the most reasonable interpretation and created the problematic impression that the Services would begin to compile information regarding the economic impacts of classification determinations and that the Services might actually take such information into account directly or indirectly when making classification determinations, which would run afoul of the Act's mandate. When evaluating a species' classification status, the Services cannot take into account potential economic impacts that could stem from the classification decision, such as costs associated with prohibitions on commercial harvest or interstate sale of that species, or other impacts, such as potential restrictions on land management.

The Act states that determinations under section 4(a)(1) are to be made solely on the basis of the best scientific and commercial data available. Congress added this requirement through amendments to the Act in 1982 (Pub. L. 97-304, Oct. 13, 1982). The legislative history for the 1982 amendments describes the purposes of the amendments using the following language (emphases added): "to ensure that [listing and delisting] decisions … are based *solely* upon biological criteria," Conf. Rep. (H.R.) No. 97-835 (1982) ("Conf. Rep."), at 19; "to prevent non-biological considerations from affecting [listing and delisting] decisions," id.; and "economic considerations *have no relevance to*

[listing and delisting] determinations," id. at 20. The legislative history of the Act is clear that the phrase "commercial data" is intended only to allow for consideration of "trade data,"" was "not intended, in any way, to authorize the use of economic considerations in the process of listing a species." See H.R. Rep. 97-657 (H.R. Rep. No. 567, 97th Cong., 2nd Sess. 1982, 1982 U.S.C.C.A.N. 2807, 1982 WL 25083) at 20. Similarly, clarifying that the Services cannot take into account potential economic impacts *stemming from* classification when making such determinations does not preclude the Services from evaluating economic data and information *relevant to understanding the threats* to the species that must be assessed under the statutory factors. In passing the Act, Congress declared that untempered economic growth and development had rendered species extinct (16 U.S.C. 1531(a)(1)) and instructed the Services to assess whether species are threatened by habitat destruction and other human-made threats (16 U.S.C. 1533(a)(1)(A)–(E)).

The removal of this phrase from the regulations, as well as certain statements made by the Services in the preamble accompanying its removal (see 83 FR 35193 at 35194–95, July 25, 2018), caused confusion regarding the Services' intentions with respect to the collection, presentation, and consideration of economic impact information stemming from the classification of species. The Services never intended, as a matter of general or routine practice, to compile, analyze, or present information pertaining to the economic impacts of species classification. However, as a result of removing this phrase, some stakeholders expected us to do just that and provided comments to that end. Restoring this phrase to the regulations would address this confusion and remove this expectation.

Furthermore, even the appearance of an intention to consider economic impact information could undermine the Services' classification determinations. Any suggestion by the Services that they could ignore the clear statutory sideboards in reaching their

classification determinations could appear to taint an otherwise appropriate, science-based listing determination and could lead to needless and time-consuming litigation to determine whether any economic impact considerations were improperly taken into account—litigation that would do nothing to further the conservation of species. We find that the previous regulatory language is most consistent with the intent of Congress and provides an important guardrail for the scientific integrity of classification determinations; therefore, we are proposing to restore this language to the regulations.

Foreseeable Future

We propose to revise § 424.11(d), which describes the Services' framework for interpreting and implementing the term "foreseeable future" in the Act's definition of "threatened species" (16 U.S.C. 1532(20)). The interpretation in the 2019 rule's framework, consistent with the Services' longstanding practice, was based on a 2009 opinion from the Department of the Interior, Office of the Solicitor (M–37021, January 16, 2009; "M-Opinion"), that provides guidance on addressing the concept of the foreseeable future within the context of determining the status of species. Following promulgation of the 2019 regulations, the language in the final rule created confusion regarding the way in which the Services interpret and implement this term. We now find it is appropriate to revise this regulatory provision to explain more clearly the concept of the foreseeable future as it is used in the Act's definition of a "threatened species" and to align the regulatory language more closely to that of the M-Opinion as discussed below. As noted below, however, we are also considering whether rescission of the provision at § 424.11(d) may be more appropriate than revising the regulatory framework.

The "foreseeable future" concept in the Act's definition of "threatened species" sets the temporal structure that guides the Services in evaluating the best available scientific information when determining whether the species meets the substantive standard set out in the Act's definition of a threatened species. The second sentence in the

"foreseeable future" paragraph we added to the regulations in 2019 (i.e., "reasonably determine that both the future threats and the species' responses to those threats are likely") created confusion, because it seemed to suggest the Services were adopting a novel requirement to conduct an independent analysis of the status of the species, rather than simply articulating how we determine the appropriate timeframe over which to conduct that analysis. The statutory reference to the "foreseeable future" simply sets the time period within which to make the substantive determination about the status of the species (i.e., whether the species is likely to become an endangered species, within the foreseeable future, 16 U.S.C. 1532(20).

Therefore, we are proposing to delete the current second sentence and replace it with the following new sentence: "The term foreseeable future extends as far into the future as the Services can reasonably rely on information about the threats to the species and the species' responses to those threats." This proposed language more clearly explains the appropriate role of the foreseeable future concept in listing determinations and is also consistent with the M-Opinion that has guided the Services since 2009 in interpreting this statutory term.

Under the M-Opinion, the extent of the foreseeable future depends on our ability to reasonably rely on information to anticipate the future. The M-Opinion describes a forecast or prediction into the foreseeable future as something that a reasonable person would rely on in making predictions about their own future (M–37021, at 8). Consistent with the best available information standard, we do not need to have absolute certainty about the information we use; rather, we need to have a reasonable degree of confidence in the prediction. Under the revisions we are proposing, the Services would continue to avoid speculation and ensure that the data, information, analysis, and conclusions we rely upon are rationally articulated and fully supported.

While we propose specific revisions to § 424.11(d), the Services are also considering whether this paragraph should be rescinded in its entirety. Prior to the addition of this provision to the regulations in 2019, both Services had been relying on M-Opinion 37021 to construe the phrase "foreseeable future" and would continue to do so even in the absence of the regulatory framework regarding the foreseeable future. Maintaining an interpretation of this statutory phrase in the regulations is of limited utility to the Services, as well as potentially confusing to the public, if that regulatory provision is susceptible to being read or understood as inconsistent with the M-Opinion, which provides a more thorough and detailed examination and explanation of how this statutory phrase is interpreted. While the M-Opinion standing alone does not have the force of law and is not binding on NMFS, both Services nonetheless continue to find it is a reasonable interpretation of the statute and intend to continue relying on it to support their listing decisions. In the absence of a regulatory framework regarding the foreseeable future, the Services would still be required to document and explain in their listing determinations how the best available data support decisions with respect to species' status over the foreseeable future.

Factors Considered in Delisting Species

We propose to make several revisions to § 424.11(e) to better clarify the procedure and standards that the Services will apply when making delisting decisions. (These provisions were previously included at § 424.11(d).) First, we propose to revise the opening sentence of this section by replacing the phrase "shall delist a species if" with "it is appropriate to delist a species if." While this proposed revision does not substantively change the meaning, standards, or procedure for delisting, we find this change would remove the potential for confusion or concerns that the Services can or will take immediate action to delist a species upon completion of a status review without following notice-and-comment rulemaking procedures, or that the outcome of such a

rulemaking is predetermined in any way. The fundamental question under the Act for listing, delisting, or reclassification is whether the species meets the definition of an "endangered species" or "threatened species" because of any of the factors in section 4(a)(1) of the Act, which is the standard we have retained in our regulations. As required by the Act, the Services intend to continue to base delisting determinations on the best available scientific and commercial data and to delist species through a rulemaking process that allows for peer review, a proposed delisting rule open to public comment, and a final rule that responds to and incorporates comments as appropriate. Furthermore, the word "shall" in these regulations is not necessary for requiring or ensuring that the Services abide by the Act's standards, which apply to all delisting decisions and cannot be supplanted by regulation.

The current regulations in § 424.11(e) list three circumstances in which it is appropriate to delist a species: the species is extinct, the species does not meet the definition of a threatened or endangered species, and the listed entity does not meet the definition of a species. These three general categories of circumstances have been in the Services' joint regulations for decades (e.g., see 45 FR 13010 at 13022, February 27, 1980). Revisions to the wording of these circumstances were made in 2019 to achieve three main goals: to simplify and streamline what was considered unnecessary and potentially confusing regulatory text, to eliminate the possibility of misinterpreting the categories of circumstances as actual criteria for delisting, and to clarify that the standards applicable to listing and delisting determinations are the same. As part of those revisions, we removed the word "recovery" from the list of reasons for delisting at what was then § 424.11(d)(2)) and changed the wording of the circumstance indicating that a species warrants delisting if it does not meet the definition of a threatened or endangered species. Specifically, this circumstance, as currently specified in 50 CFR 424.11(e)(2)), was revised in 2019 to indicate that a species would be delisted if it does not meet the

definition of an endangered species or a threatened species and that, in making such a determination, the Services would apply the same factors and standards as when making listing and reclassification determinations.

As we explained in the 2019 rule and the associated proposed rule, in making this revision, our intention was to clarify that the standard for whether a species merits protection under the Act should be applied consistently, regardless of whether the context is potential listing, reclassification, or delisting; and to remove the misperception that delisting decisions are contingent upon the satisfaction of a recovery plan for that species (e.g., 84 FR 45020 at 45036, August 27, 2019). This revision and the removal of the word "recovery" were the focus of many public comments. Commenters expressed concerns that the Services would begin to delist species before they are recovered and asserted that these revisions could circumvent recovery plans and improperly make section 4(f) of the Act meaningless (84 FR 45020 at 45035, August 27, 2019). As we explained in the 2019 rule, we disagreed that the Services would begin to delist species before they are recovered and indicated that we would continue to develop and use recovery plans to guide recovery of listed species consistent with the Act. We also explained that the revisions in no way would diminish the Services' goal of recovering threatened and endangered species.

Although we do not agree that any of the outcomes expressed in comments received in 2019 would come to pass under the regulations as revised in 2019, after reconsidering these regulations we find that it is appropriate and preferable to include "recovered" in the delisting regulations as an express, important example of when a species should be delisted. Therefore, we propose to insert the phrase "the species is recovered" at the beginning of this particular provision. Specifically, we are proposing to revise 50 CFR 424.11(e)(2) to read as follows: The species is recovered or otherwise does not meet the definition of a threatened or endangered species. In making such a

determination, the Secretary shall consider the factors and apply the standards set forth in paragraph (c) [of § 424.11] regarding listing and reclassification.

We find that inclusion of the word "recovered," and thus the concept of recovery, in the delisting regulations acknowledges one of the principal goals of the Act and of the Services. Using the term "recovered" in our regulations maintains a clear linkage between this primary goal and one of the circumstances in which the Services would delist a species. Because this section of the regulations still clearly indicates that the Secretary must consider the factors and standards of section 4 of the Act when evaluating species for delisting, the revision we now propose does not alter, in any way, the set of circumstances in which delisting is appropriate, or the standards or process for doing so. As courts have made clear, satisfying a recovery plan is one, but not the exclusive, possible pathway by which a species may reach the point of no longer requiring the protections of the Act (*Friends of Blackwater* v. *Salazar*, 691 F.3d 428 (D.C. Cir. 2012)).

We note that we are not proposing to remove the phrase "does not meet the definition of a threatened or endangered species," which was added to § 424.11(e) in 2019. We are retaining this phrase because the Act requires that species added to or retained on the lists of threatened and endangered species meet the definition of either a "threatened species" or an "endangered species." We are also retaining this phrase because recovery is not the only reason that a species may not meet the definition of a threatened or endangered species. For example, additional data may become available after a species has been listed that reveal that another species that was previously classified as taxonomically distinct is actually part of the listed entity. In this hypothetical example, the additional data could potentially lead to a finding that the particular listed species does not meet the definitions of either "threatened species" or "endangered species" and should therefore be delisted.

Lastly, we propose to remove the word "same" from both instances where it occurs in the sentence stating that we must "consider the same factors and apply the same standards" when determining whether a species is recovered or no longer warrants listing as when listing or reclassifying a species. As already stated, while delisting determinations must review the species' status and consider the factors listed in section 4(a)(1) of the Act using the best scientific and commercial data available, we propose to remove the word "same" to eliminate any possible, though unintended, confusion that the analysis is limited to those same, specific factors or threats that initially led us to list that particular species. For example, a particular threat or combination of threats, such as overfishing and inadequate harvest regulations, may have caused a species' initial decline and endangerment, but those threats may have subsequently been controlled, and other threats, such as habitat modification and disease, may have since arisen. A status review conducted to determine whether a species warrants delisting must consider not just the same factors that led to the initial listing, but also any relevant factors that affect the biological status of the species. Thus, while the set of factors identified in section 4(a)(1) of the Act and the standards outlined in section 4(b)(2) of the Act apply in the context of listing, delisting, and reclassification decisions, the particular circumstances and facts may differ.

In addition to the substantive revisions discussed above, we are also proposing one administrative revision to § 424.11(a) to correct a cross-reference. The citation to "§ 424.02(k)" is wrong as § 424.02 does not include a paragraph (k) or any designated paragraphs. Therefore, we are proposing to replace the reference to "§ 424.02(k)" with a reference to "§ 424.02."

Section 424.12—Criteria for Designating Critical Habitat

Not-Prudent Determinations

We propose to revise § 424.12(a)(1), which provides a non-exhaustive list of circumstances in which the Services may find it is not prudent to designate critical habitat. Specifically, we propose to remove the second half of § 424.12(a)(ii), which states that designation of critical habitat would not be prudent if threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act. This was a newly identified circumstance adopted through the 2019 rule. In adding this language, our stated intent was to identify a circumstance in which designation of critical habitat may not contribute to the conservation of the species. As explained in the preamble to the 2019 rule, scenarios in which such a circumstance might arise include when the listed species is experiencing adverse impacts solely from climate-driven threats such as melting glaciers, sea-level rise, or reduced snowpack and no other habitat-related threats (84 FR 45020 at 45042, August 27, 2019).

Following our review of this language in light of the goals laid out in E.O. 13990, we find that this clause requires that the Services presuppose the scope and outcomes of future section 7 consultations under the Act and suggests that the only conservation benefits of a critical habitat designation are through the section 7 process, a presumption not supported by the language of the Act or court decisions (see, e.g., *Natural Res. Def. Council* v. *U.S. Dep't of the Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997) (rejecting FWS's argument that, in order for there to be a benefit from designation, the majority of land use activities in critical habitat would have to be subject to section 7 consultation); *Conservation Council for Haw.* v. *Babbitt*, 2 F. Supp. 2d 1280, 1286 (D. Haw. 1998) (reasoning that even though consultation requirements apply only to Federal activities, Congress did not exclude private lands from the designation of critical habitats in part because "the designation of the critical habitat provides greater information [than listing alone] to the public and state and local government by informing not only that the species

is endangered or threatened but also what area is essential to the conservation of the species.")). This language has also been interpreted by the public as potentially allowing the Services to regularly decline to designate critical habitat for species threatened by climate change, which was not our intent.

For these reasons, and to clarify that the Services intend to continue to consider anticipated climate-change impacts in the context of critical habitat designations, we are now proposing to remove this language. While the Act provides some limited flexibility to find that the designation of critical habitat should not be undertaken for particular species, as we described in the preamble to the 2019 rule, not-prudent determinations are rare, and we anticipate they will continue to be rare.

We also propose to delete § 424.12(a)(1)(v), which is the last circumstance set forth in § 424.12(a)(1), and states that the Secretary otherwise determines critical habitat would not be prudent based on the best scientific data available. Setting this text out separately within the list of circumstances in which the Secretary could potentially make a not-prudent determination inadvertently gave the appearance that the Services might overstep their authority under the Act by issuing "not prudent" determinations for any number of unspecified reasons that may be inconsistent with the purposes of the Act. As this was not our intention, we are proposing to remove the circumstance set out in § 424.12(a)(1)(v). However, we cannot foresee all possible circumstances in which critical habitat may not be prudent, and the statute does not identify the circumstances in which a designation is "not prudent." Rather, the statute delegates to the Secretary the authority to make a determination that critical habitat is not prudent, subject to the requirements that the determination is based on the best available scientific data and so long as the determination is not inconsistent with the conservation purposes of the Act. Therefore, we propose to retain in the regulations a recognition that the Secretary may make not-prudent determinations in cases that do not fit within the remaining circumstances set

forth in § 424.12(a)(1)(i)–(iv) by inserting a clause into the opening sentence of this section to indicate that the list of identified circumstances is not intended to be exhaustive.

Designating Unoccupied Areas

We propose to make several revisions to § 424.12(b)(2) to address the designation of specific areas as unoccupied critical habitat (specific areas outside the geographical area occupied by the species at the time the species is listed under the Act). As we discuss further below, the changes we now propose would remove requirements for designating unoccupied critical habitat that are not mandated by the language or structure of the Act and, in the view of the Services, would better fulfill the Secretaries' authority to further the conservation purposes of the Act. As part of these revisions, we also propose to make a series of wording changes to improve readability and organization of this section of the regulations.

The regulations governing the designation of unoccupied critical habitat have been amended twice within recent years, once through a 2016 rule (81 FR 7414, February 11, 2016) and then through the 2019 rule that we are now revisiting (84 FR 45020, August 27, 2019). In both the 2016 and 2019 rules, the Services addressed the concept of prioritizing or sequencing how occupied and unoccupied areas should be considered when developing a critical habitat designation. In the 2019 rule, we revised the criteria for designating unoccupied critical habitat to explicitly require a two-step process that prioritizes the designation of occupied areas over unoccupied areas by adding the following sentence: The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species (84 FR 45020 at 45053, August 27, 2019). A similar prioritization step was removed from the implementing regulations in 2016, because, at that time, we determined that it was an unnecessary and unintentionally

limiting requirement (81 FR 7414 at 7434, February 11, 2016). The revisions made in 2016 instead allowed for simultaneous consideration of occupied and unoccupied habitat according to the definition of "critical habitat" in the Act. In justifying the adoption of new regulatory requirements for designating unoccupied areas in 2019, which included a two-step prioritization process, we explained that we were responding to concerns that the Services would inappropriately designate overly expansive areas of unoccupied critical habitat (83 FR 35193 at 35197–98, July 25, 2018), and that a two-step approach would help further Congress' intent to place increased importance on habitat within the geographical area occupied by the species (84 FR 45020 at 45043, August 27, 2019).

We now propose to address this issue anew by revising § 424.12(b)(2) to set out a clear and logical approach for identifying unoccupied critical habitat that, as we discuss below, better fulfills the statutory objectives regarding critical habitat. Specifically, our proposed, revised version of § 424.12(b)(2) is as follows: After first evaluating areas occupied by the species, the Secretary will identify, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species at the time of listing that the Secretary determines are essential for the conservation of the species. Such a determination must be based on the best scientific data available.

This proposal would insert text stating "after identifying areas occupied by the species at the time of listing" to the first sentence and delete the second sentence of the current regulation stating that the Secretary will first identify areas occupied by the species. As is clear from the text, under this proposed change the Services would continue to identify and consider areas that are occupied by the species before evaluating areas that are unoccupied by the species. We find that this approach is the most logical way to begin a critical habitat analysis and has consistently been the practice of the Services regardless of which regulations have been in place.

However, we also propose to remove the sentence that was added in 2019 stating that the Secretary "will only consider" unoccupied areas to be essential where a critical habitat designation limited to occupied areas would be inadequate to ensure the conservation of the species. Deletion of this sentence from the current regulation would remove the requirement that the Secretary exhaust all occupied areas before considering whether any unoccupied areas may be essential for conservation of the particular species. Neither the Act nor the legislative history creates a requirement to exhaust occupied areas before considering designation of unoccupied areas; therefore, this is an area where the statutory framework contains a gap that the Services may fill with a reasonable interpretation as we are presenting here.

In the preamble to the 2019 rule, we presented certain legislative history to support the approach in that final rule, but those sources do not unequivocally support the approach that was ultimately adopted. For example, although we stated in 2019 that Congress intended to place increased importance on habitat within the geographical area occupied by the species (84 FR 45020 at 45043, August 27, 2019), it is not clear that that was the best interpretation of the intent of Congress from the H.R. Rep. 95-1804, which we cited. Moreover, the Act does not require that occupied habitat be found inadequate for conservation before unoccupied habitat can be designated. Rather the Act requires that the Services identify areas that meet the definition of critical habitat—occupied and unoccupied—based on the best available data, and then consider economic, national security, and other relevant impacts of designating any particular area. The 1978 House Report, for example, expressed the House Committee's belief that "the Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species" (H.R. 96-1625, at 25 (1978)), but it does not require determining that a designation limited to occupied critical habitat is inadequate before allowing any consideration of unoccupied areas.

More importantly, the "inadequacy" requirement added in 2019 could undermine the Secretaries' duty to designate areas that otherwise meet the definition of critical habitat and are essential to support the conservation of the species. Under the proposed revisions, we would no longer need to determine that a designation limited to occupied areas is "inadequate to ensure the conservation of the species" before we could even consider designating unoccupied habitat. In short, the proposed revision removes unnecessary constraints to the Secretaries' duty to consider designation of unoccupied areas where such areas are essential for the species' conservation and, in our view, better aligns the regulations with the statutory definition of "critical habitat." Furthermore, under the proposed revision, we would still be required to provide a rational explanation of why any unoccupied areas are essential for the conservation of the species. Because the identification of areas that are essential for the conservation of a species is a scientific and fact-specific inquiry, we continue to recognize that the exercise of this authority requires a reasoned explanation in the supporting administrative record for a particular designation of why any areas that are not occupied by the species are essential for its conservation.

In § 424.12(b)(2), we also propose to strike the last sentence, which states that for an unoccupied area to be considered essential, the Secretary must determine, with reasonable certainty, both that the area will contribute to the conservation of the species and that it contains one or more of the physical or biological features essential to the conservation of the species. After reconsidering this particular sentence, which was added to the regulations in 2019, we find that these additional criteria for determining whether an area is "essential" impose standards for designating unoccupied critical habitat that go beyond, and could potentially conflict with, the science-based determination required by the statute and the Act's mandate to designate critical habitat to the maximum extent prudent and determinable based on the best scientific data available (see 16 U.S.C.

1533(a)(3)(A), 1533(b)). The Act requires that critical habitat be designated on the basis of the best scientific data available and, based on those data, whether and what specific unoccupied areas are essential for the conservation of the species.

Imposing a "reasonable certainty" standard is also unnecessary in light of the best available data standard of the Act, because this standard already inherently contains an obligation for the Services not to base their decisions on information that is merely potential or speculative. Moreover, the statutory best scientific data available standard has not previously been interpreted to require a specific level of certainty, such as the "high degree" level articulated in the 2019 final rule preamble (84 FR 45020 at 45022, August 27, 2019). Imposing a specific standard of certainty therefore could potentially result in the Services excluding from consideration the best available data merely because it was deemed not to be sufficiently certain. All of the Services' critical habitat designations must comply with both the Act's "best scientific data available" standard as well as the standards for rational agency decision-making.

Courts have held that the Act's "best scientific data available" standard, which also applies (with slight differences not relevant here) to listing decisions and biological opinions under section 7, does not require that the information relied upon by the Services be perfect or free from uncertainty. (See, e.g., *Oceana, Inc.* v. *Ross*, 321 F. Supp. 3d 128, 142 (D.D.C. 2018) ("the plain language of the provision requires NMFS only to use the best data *available*, not the best data *possible*") (emphases in original); *Alaska Oil & Gas Ass'n* v. *Jewell,* 815 F.3d 544, 555 (9th Cir. 2016) (noting that the Act's best-data-available requirement does not require perfection in the data but only precludes basing decisions on speculation or surmise) (citations omitted).

In short, the Act "accepts agency decisions in the face of uncertainty" where the Services have used the best data available. *Arizona Cattle Growers' Ass'n* v. *Salazar*, 606 F.3d 1160, 1164 (9th Cir. 2010) (citations omitted); see also *In re Polar Bear*

Endangered Species Act Listing & 4(d) Rule Litigation, 794 F. Supp. 2d 65, 106 (D.D.C. 2011) ("It is well-settled in the D.C. Circuit that FWS is entitled—and, indeed, required—to rely upon the best available science, even if that science is uncertain or even 'quite inconclusive.'") (citation omitted), *aff'd*, 709 F.3d 1 (D.C. Cir. 2013); *Oceana, Inc.* v. *Evans*, 384 F. Supp. 2d 203, 219 (D.D.C.) ("Time and again courts have upheld agency action based on the 'best *available*' science, recognizing that some degree of speculation and uncertainty is inherent in agency decision-making, even in the precautionary context of the ESA.") (emphasis in original), *order clarified*, 389 F. Supp. 2d 4 (D.D.C. 2005).

In proposing to delete the last sentence of § 424.12(b)(2), we would also remove the requirement for unoccupied areas to contain (with reasonable certainty) one or more of the physical or biological features essential to the conservation of the species ("essential features"). Congress expressly defined occupied critical habitat and unoccupied critical habitat separately, mentioning essential features only in connection with occupied critical habitat (see 16 U.S.C. 1532(5)(A)(i)). Further, with respect to unoccupied habitat, the Act requires a determination that designated areas are essential for the conservation of the species (see 16 U.S.C. 1532(5)(A)(ii)). However, in 2019, we interpreted the legislative history as supporting a conclusion that unoccupied critical habitat must contain one or more essential feature(s). In particular, in the 2019 rule preamble, we pointed to a statement in the 1978 House Committee report and asserted that the Services' 1978 regulatory definition of "critical habitat" could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat (H.R. Rep. No. 95-1625, at 25 (1978)), and we implied that this statement, among others, reflected an intention on the part of Congress that unoccupied critical habitat be defined more narrowly than as areas contemplated for species expansion. See 84 FR 45020 at 45022, August 27, 2019 (citing H.R. Rep. No. 95-1625 pp. 18, 25 (1978); S. Rep. No. 95-874, at 9–10 (1978)).

In reviewing the discussion presented in the 2019 rule and the legislative history related to the 1978 amendments to the Act, we now find that the 2019 rule preamble created unnecessary tension with the statutory text as adopted (see 16 U.S.C. 1532(5)(A); 84 FR 45020 at 45022, August 27, 2019 (describing portions of 1978 House and Senate Reports reacting to the Services' 1978 regulatory definition of "critical habitat")). While we relied on those excerpts from legislative history regarding earlier draft statutory language as illuminating the meaning of "unoccupied critical habitat," the actual text of the Act does not carry over the requirements for occupied critical habitat into the definition of unoccupied critical habitat. The best evidence of congressional intent is well understood to be reflected in the text of a statute itself (see, e.g., Sutherland Statutes and Statutory Construction, volume 2A, section 45:5 (7th ed.) ("Judicial opinions overwhelmingly emphasize the legislature's words as the most reliable source of legislative intent, particularly when a statute is 'unambiguous.'") (internal citations omitted)), and the statutory definition of "critical habitat" clearly establishes different criteria for occupied and unoccupied critical habitat (see 16 U.S.C. 1532(5)(A)). By confounding the criteria for defining occupied and unoccupied critical habitat, we eroded the statutory distinction between those two types of areas and made the standards for designating those areas more similar than what the Act plainly indicates.

We acknowledge, as discussed in the preamble to the 2019 rule, that a number of court decisions have addressed the relationship between the standards for designation for unoccupied critical habitat and those for occupied critical habitat. The revised § 424.12(b)(2) we now propose would be consistent with the cases referenced in the 2019 preamble (*Home Builders Ass'n* v. *U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 990 (9th Cir. 2010) ("Essential conservation is the standard for unoccupied habitat ... and is a more demanding standard than that of occupied critical habitat."); *Cape Hatteras Access Pres. All.* v. *U.S. Dep't of the Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("it is not

enough that the area's features be essential to conservation, the area itself must be essential")). These decisions do not add any limitations to the designation of unoccupied critical habitat that do not appear in the Act itself. Our proposal best conforms to the statutory standard for designating unoccupied critical habitat by reiterating the requirement that the Secretary must determine any unoccupied areas identified for designation are essential to the species' conservation.

The preamble of the 2019 rule also pointed to the decision in *Weyerhaeuser Co.* v. *U.S. FWS,* 139 S. Ct. 361 (2018), as justification for adding the requirement that at least one essential feature be present in order for unoccupied areas to qualify for designation as critical habitat. In *Weyerhaeuser*, the Court held that an area is eligible for designation as critical habitat under the Act only if it is habitat for that species. The *Weyerhaeuser* decision, however, does not resolve the specific issue of how to define "habitat" against the backdrop of the two prongs of the statutory definition of "critical habitat." To avoid the potential for rendering any part of the statutory language surplusage, we find that our implementing regulations must clearly accord independent meaning to each prong. Therefore, we no longer find that importing language from the statutory definition of "occupied" critical habitat (regarding essential features) into the requirements for defining "unoccupied" critical habitat is the best way to resolve this issue. We now find that requiring reasonable certainty that one or more essential features are present in an area is an unnecessary and, ultimately, an incomplete substitute for the full science-based and species-specific inquiry into whether an area qualifies as habitat. As we articulated in the recent final rule rescinding the regulatory definition of the term "habitat," we recognize the importance of the Supreme Court's ruling in *Weyerhaeuser* and will ensure that the administrative record for each designation documents how the designated areas are in fact habitat for the particular species at issue, using the best available scientific data and explaining the needs of that species (87 FR 37757, June 24, 2022).

In the 2019 rule preamble, we also acknowledged that the Services had not previously taken the position that unoccupied critical habitat must contain essential features (see 84 FR 45023, August 27, 2019). As a practical matter, many areas of unoccupied habitat that are included in a critical habitat designation will contain one or more habitat features essential to the conservation of the species. However, the plain language of the Act does not require this to be the case, and we no longer consider the best reading of the Act to require that unoccupied areas contain "one or more of those physical or biological features essential to the conservation of the species" for the area itself to be essential for that species' conservation. The revisions we are now proposing would bring the Services' interpretation in line with this better reading of the statute.

In addition, we note that neither the two-step prioritization process for designating unoccupied critical habitat nor the requirement for "reasonable certainty" for conservation or presence of essential features is necessary to achieve the purported goal of avoiding overly expansive designations. The Act sufficiently guards against this outcome by requiring the Secretary to explain why any unoccupied areas are essential for the conservation of the species and by providing in section 3 that the Secretary will generally not designate all areas that can be occupied by the species (16 U.S.C. 1532(5)(C)).

We also propose to make a series of more minor revisions to § 424.12(b)(2) that collectively would streamline the text and improve clarity and readability. Specifically, we propose to make the regulatory language of § 424.12(b)(2) consistent with, and parallel to, the regulatory language of the preceding paragraph (§ 424.12(b)(1)) by replacing the existing phrase "will designate as critical habitat" with the words "will identify, at a scale determined by the Secretary to be appropriate, specific areas...." This proposed revision would also describe the process of designating critical habitat in a more logical way, because identifying specific areas that may qualify as unoccupied

critical habitat must occur before any designation of those areas; even after identifying specific areas that qualify as critical habitat, the Services must complete subsequent, required steps (e.g., consideration of impacts as outlined in 50 CFR 424.19) before designating those areas as critical habitat.

We also propose to make a minor clarifying amendment to the first sentence of § 424.12(b)(2) by inserting the phrase "at the time of listing" to avoid potential ambiguity and align the characterization of unoccupied areas with the statutory definition of "critical habitat." While this additional language does not alter the meaning or intent of the first sentence of § 424.12(b)(2), the proposed language would improve the clarity of the regulatory text. In the first sentence, we also propose to simplify the regulatory text by replacing the existing phrase "only upon a determination that such areas" with "that the Secretary determines." The current phrase is unnecessary, as the Act already clearly establishes through the section 3 definition of "critical habitat" that the designation of unoccupied areas must be based upon a determination that those areas are essential for the conservation of the species (see 16 U.S.C. 1532(5)(a)(ii)).

Lastly, we propose to add a sentence to the end of § 424.12(b)(2) that reiterates the statutory requirement to identify unoccupied critical habitat using the best scientific data available. This additional proposed sentence serves to emphasize the statutory requirement that the determination of whether a specific area is essential for the conservation of the species must be driven by the best available data.

In conclusion, we have reconsidered the 2019 rule and now find that the interpretation of unoccupied critical habitat adopted in 2019 is not the best one for the multiple reasons outlined here. In view of the Act's framework and conservation purposes, as well as the "best scientific data available" standard (16 U.S.C. 1533(b)(2)) and the requirement to designate critical habitat "to the maximum extent prudent and determinable" (16 U.S.C. 1533(a)(3)(A)), we find that it is most appropriate for the

Services to make all the required determinations on the basis of the best available science and the particular record for the action at hand, consistent with the generally applicable legal standards. By deleting the multiple, additional requirements for designating unoccupied critical habitat that were added in 2019, we would restore the implementation of section 3(5)(A) of the Act so as to better reflect the statutory language and the legislative history.

Request for Comments

We are seeking comments from all interested parties on the proposed revisions to 50 CFR part 424, as well as on any of our analyses or conclusions in the Required Determinations section of this document. We will also accept public comment on all aspects of the 2019 rule, including whether any of those provisions should be rescinded in their entirety (restoring the prior regulatory provision) or revised in a different way. All relevant information will be considered prior to making a final determination regarding the regulations for listing endangered and threatened species and designating critical habitat. Depending on the comments received, we may change the proposed regulations based upon those comments. You may submit your comments and materials concerning the proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**. Comments sent by any other method, to any other address or individual, may not be considered.

Comments and materials we receive will be posted and available for public inspection on *https://www.regulations.gov*. This generally means that we will post any personal information you provide us. If you provide personal identifying information in your comment, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do

so. Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

Required Determinations

Regulatory Planning and Review—Executive Orders 12866, 13563, and 14094

Executive Order 12866, as amended by Executive Order 14094, provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this proposed rule is significant.

Executive Order 14094 amends E.O. 12866 and reaffirms the principles of E.O. 12866 and E.O 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and be consistent with E.O. 12866, E.O. 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements. This proposed rule is consistent with E.O. 13563 and in particular with the requirement of retrospective analysis of existing rules designed "to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."

We are proposing revisions to the Services' implementing regulations at 50 CFR 424.11 and 424.12. Specifically, the Services are proposing changes to implementing regulations at: (1) § 424.11(b), the factors for listing, delisting, or reclassifying species; (2) § 424.11(d), the foreseeable future framework; (3) § 424.11(e), the standards for

delisting; (4) § 424.12(a), criteria for not prudent determinations for critical habitat; and (5) § 424.12(b)(2), the criteria for designation of unoccupied critical habitat. The preamble to this proposed rule explains in detail why we anticipate that the regulatory changes we are proposing will improve the implementation of the Act.

When we made changes to these same sections in 2019, we compiled historical data on the occurrence of specific metrics of listing and critical habitat determinations by the Services in an effort to describe for OMB and the public the potential scale of any effects of those regulations (on *https://www.regulations.gov*, see Supporting Document No. FWS-HQ-ES-2018-0006-0002 of Docket No. FWS–HQ–ES–2018–0006; Docket No. 180202112-8112-01). We presented various metrics related to the regulation revisions, as well as historical data supporting the metrics.

For the 2019 regulations, we concluded—with respect to the provisions related to listing, reclassification, and delisting of species—that, because those revisions served to clarify rather than alter the standards for classifying species, the 2019 regulation revisions would not change the average number of species classification (i.e., listing, reclassification, delisting) outcomes per year. With respect to the critical habitat provisions, we concluded that, because the outcomes of critical habitat determinations are highly fact-based, it was not possible to forecast reliably whether more or fewer not-prudent determinations or designations of unoccupied critical habitat would be made each year if the 2019 regulation revisions were finalized.

The revisions we are now proposing to the listing, delisting, and reclassification provisions as described above are intended to align more closely with the statute and to provide transparency and clarity—not only to the public and stakeholders, but also to the Services' staff in the implementation of the Act. As a result, we do not anticipate any change in the rate or frequency or particular classification outcomes due to the proposed regulation. Similarly, the proposed revisions to the provisions related to the Secretaries'

duty to designate critical habitat are intended to align the regulations with the Act, and—because the outcomes of critical habitat analyses are so highly fact-specific and it is not possible to forecast how many related circumstances will arise—any future benefit or cost stemming from these revisions is currently unknowable.

These changes provide transparency and clarity, and there are no identifiable, quantifiable effects from the proposed rule. Further, we do not anticipate any material effects such that the rule would have an annual effect that would reach or exceed $200 million or would adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or Tribal governments or communities.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 et seq.), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency, or that person's designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We are certifying that these proposed regulations would not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

This proposed rule would revise and clarify requirements for NMFS and FWS in classifying species and designating critical habitat under the Act and do not directly affect small entities. NMFS and FWS are the only entities that would be directly affected by this proposed rule because we are the only entities that list species or designate critical habitat. No external entities, including any small businesses, small organizations, or small governments, will experience any direct economic impacts from this proposed rule. Therefore, we certify that, if adopted as proposed, this rule would not have a significant economic effect on a substantial number of small entities.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.):

(a) On the basis of information contained in the Regulatory Flexibility Act section above, this proposed rule would not "significantly or uniquely" affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that this proposed rule would not impose a cost of $100 million or more in any given year on local or State governments or private entities. A small government agency plan is not required. As explained above, small governments would not be affected because the proposed rule would not place additional requirements on any city, county, or other local municipalities.

(b) This proposed rule would not produce a Federal mandate on State, local, or Tribal governments or the private sector of $100 million or greater in any year; that is, this proposed rule is not a "significant regulatory action"" under the Unfunded Mandates Reform Act. This proposed rule would impose no obligations on State, local, or Tribal governments.

Takings (E.O. 12630)

In accordance with Executive Order 12630, this proposed rule would not have significant takings implications. This proposed rule would not pertain to "taking" of

private property interests, nor would it directly affect private property. A takings implication assessment is not required because this proposed rule (1) would not effectively compel a property owner to suffer a physical invasion of property and (2) would not deny all economically beneficial or productive use of the land or aquatic resources. This proposed rule would substantially advance a legitimate government interest (conservation and recovery of endangered species and threatened species) and would not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, we have considered whether this proposed rule would have significant federalism effects and have determined that a federalism summary impact statement is not required. This proposed rule pertains only to factors for listing, delisting, or reclassifying species and designation of critical habitat under the Endangered Species Act and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform (E.O. 12988)

This proposed rule would not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988. This proposed rule would clarify factors for listing, delisting, or reclassifying species and designation of critical habitat under the Endangered Species Act.

Government-to-Government Relationship with Tribes

In accordance with Executive Order 13175 "Consultation and Coordination with Indian Tribal Governments," the Department of the Interior's manual at 512 DM 2, and the Department of Commerce (DOC) "Tribal Consultation and Coordination Policy" (May 21, 2013), DOC Departmental Administrative Order (DAO) 218–8, and NOAA

Administrative Order (NAO) 218–8 (April 2012), we considered possible effects of this proposed rule on federally recognized Indian Tribes. This proposed rule is general in nature and does not directly affect any specific Tribal lands, treaty rights, or Tribal trust resources. Therefore, we preliminarily conclude that this proposed rule does not have "tribal implications" under section 1(a) of E.O. 13175. Thus, formal government-to-government consultation is not required by E.O. 13175 and related policies of the Departments of Commerce and the Interior. We will continue to collaborate with Tribes on issues related to federally listed species and their habitats. See Joint Secretaries' Order 3206 ("American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act," June 5, 1997).

Paperwork Reduction Act

This proposed rule does not contain any new collection of information that requires approval by the OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We are analyzing this proposed regulation in accordance with the criteria of NEPA, the Department of the Interior regulations on implementation of NEPA (43 CFR 46.10–46.450), the Department of the Interior Manual (516 DM 8), the NOAA Administrative Order 216–6A, and the companion manual, "Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities," which became effective January 13, 2017. We invite the public to comment on the extent to which these proposed regulations may have a significant impact on the human environment or fall within one of the categorical exclusions for actions that have no

individual or cumulative effect on the quality of the human environment. We will complete our analysis, in compliance with NEPA, before finalizing this proposed rule.

Endangered Species Act

In developing this proposed rule, the Services are acting in their unique statutory role as administrators of the Act and are engaged in a legal exercise of interpreting the standards of the Act. The Services' promulgation of interpretive rules that govern their implementation of the Act is not an action that is in itself subject to the Act's provisions, including section 7(a)(2). The Services have a historical practice of issuing their general implementing regulations under the ESA without undertaking section 7 consultation. Given the plain language, structure, and purposes of the ESA, we find that Congress never intended to place a consultation obligation on the Services' promulgation of implementing regulations under the Act. In contrast to actions in which we have acted principally as an "action agency" in implementing the Act to propose or take a specific action (e.g., issuance of section 10 permits and actions under statutory authorities other than the ESA), here, the Services are carrying out an action that is at the very core of their unique statutory role as administrators—promulgating general implementing regulations interpreting the terms and standards of the statute.

Energy Supply, Distribution or Use (E.O. 13211)

Executive Order 13211 requires agencies to prepare statements of energy effects when undertaking certain actions. The proposed revised regulations are not expected to affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and no statement of energy effects is required.

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you believe that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Authority

We issue this proposed rule under the authority of the Endangered Species Act, as amended (16 U.S.C. 1531 et seq.).

List of Subjects in 50 CFR Part 424

Administrative practice and procedure, Endangered and threatened species.

Proposed Regulation Promulgation

For the reasons set out in the preamble, we hereby propose to amend part 424, subchapter A of chapter IV, title 50 of the Code of Federal Regulations, as set forth below:

PART 424—LISTING ENDANGERED AND THREATENED SPECIES AND DESIGNATING CRITICAL HABITAT

1. The authority citation for part 424 continues to read as follows:

AUTHORITY: 16 U.S.C. 1531 et seq.

2. Amend § 424.11 by:

a. In paragraph (a), removing the text "§ 424.02(k)" and adding in its place the text "§ 424.02"; and

b. Revising paragraphs (b), (d), and (e) to read as follows:

§ 424.11 Factors for listing, delisting, or reclassifying species.

* * * * *

(b) The Secretary shall make any determination required by paragraphs (c), (d), and (e) of this section solely on the basis of the best available scientific and commercial information regarding a species' status without reference to possible economic or other impacts of such determination.

* * * * *

(d) In determining whether a species is a threatened species, the Services must analyze whether the species is likely to become an endangered species within the foreseeable future. The term foreseeable future extends as far into the future as the Services can reasonably rely on information about the threats to the species and the species' responses to those threats. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time.

(e) It is appropriate to delist a species if the Secretary finds, after conducting a status review based on the best scientific and commercial data available, that:

(1) The species is extinct;

(2) The species is recovered or otherwise does not meet the definition of a threatened or endangered species. In making such a determination, the Secretary shall

consider the factors and apply the standards set forth in paragraph (c) of this section regarding listing and reclassification; or

(3) The listed entity does not meet the statutory definition of a species.

* * * * *

3. Amend § 424.12 by:

a. Revising the introductory text of paragraph (a)(1) and paragraphs (a)(1)(ii) through (iv);

b. Removing paragraph (a)(1)(v); and

c. Revising paragraph (b)(2).

The revisions read as follows:

§ 424.12 Criteria for designating critical habitat.

(a) * * *

(1) Designation of critical habitat may not be prudent in circumstances such as, but not limited to, the following:

* * * * *

(ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species;

(iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States; or

(iv) No areas meet the definition of critical habitat.

* * * * *

(b) * * *

(2) After identifying areas occupied by the species at the time of listing, the Secretary will identify, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species at the time of listing that the

Secretary determines are essential for the conservation of the species. Such a determination must be based on the best scientific data available.

* * * * *

Shannon A. Estenoz,

Assistant Secretary for Fish and Wildlife and Parks,

Department of the Interior.

Richard W. Spinrad,

Under Secretary of Commerce for Oceans and Atmosphere,

NOAA Administrator,

National Oceanic and Atmospheric Administration.

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